IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

RAY JIRUSKA, S.E. IOWA BUSINESS SERVICES, INC., an Iowa Corporation, DEJ ENTERPRISES, INC., an Iowa Corporation, RLJ ENTERPRISES, INC., an Iowa Corporation, DFJ ENTERPRISES, INC., an Iowa Corporation, and RRJ ENTERPRISES, INC., an Iowa Corporation,	)	No. C00-143-MJM
	)	**OPINION AND ORDER**
Plaintiffs,	)	
vs.	)	
HRB ROYALTY, INC., a Delaware Corporation, H&R BLOCK TAX SERVICES, INC., a Missouri Corporation, H&R BLOCK EASTERN TAX SERVICES, INC., a Missouri Corporation, and H&R BLOCK, INC., a Missouri Corporation,	)	
Defendants.	)	

Plaintiffs Ray Jiruska, S.E. Iowa Business Services, Inc., DEJ Enterprises Inc., RLJ Enterprises, Inc., DFJ Enterprises, Inc., and RRJ Enterprises, Inc., (Plaintiffs), filed an amended complaint and a demand for arbitration, asking this court to compel Defendants HRB Royalty, Inc., H&R Block Tax Services Inc., H&R

Block Eastern Tax Services, Inc., and H&R Block, Inc., (hereinafter Block Parties) to arbitrate a dispute over the parties' franchise agreements. The Block Parties filed a motion to dismiss Plaintiffs' first amended complaint and demand for arbitration. In addition to the instant proceedings, the parties are involved in litigation in Missouri state court on related issues. For the following reasons, the court exercises its discretion to abstain and grants the Defendants' motion to dismiss.

I. Background

This case arises out of franchise agreements ("Agreements") entered into between the Plaintiffs and the Block Parties in the 1950s and 1960s. The Agreements allow the Plaintiffs to utilize the "H&R Block" mark and other trade related marks in connection with Plaintiffs' individual business activities, comprised principally of tax preparation services. The Plaintiffs' amended complaint states the Agreements contained provisions preventing the Block Parties from engaging in tax preparation and related services within the individual Plaintiffs' service territories. Plaintiffs allege Defendants breached this non-compete provision by selling tax preparation software and other related services within the territory protected by the non-compete provision. Plaintiffs also state the Defendants have acquired, and are in the process of acquiring, large regional accounting firms under the Block Parties' corporate umbrella in direct contravention of the non-compete clause. Plaintiffs contend the Block Parties, pursuant to the Agreements, owe damages from the

competition royalties earned from these activities.

In April of 1999, Plaintiffs, along with other similarly situated individuals and businesses, filed an action in Missouri state court, against the same Block Parties in this litigation, alleging the Block Parties breached the non-compete provision of the Agreements and seeking competition royalties for the alleged breach. HRB Royalty, Inc., filed a counterclaim in the Missouri state court action on June 21, 1999, seeking a declaration of its right to "non-renew" the Plaintiffs' franchise agreements. In June of 2000, Defendants sent Plaintiffs Nonrenewal Notices informing Plaintiffs that the Block Parties would not renew Plaintiffs' franchises. Defendant HRB Royalty moved for summary judgment on its counterclaim in the Missouri state court litigation in July of 2000. The Plaintiffs filed this action on August 30, 2000, and demanded arbitration of Block's intention to non-renew the franchise agreements. In November of 2000, the parties entered into a standstill agreement suspending the effectiveness of the Nonrenewal Notices. On April 24, 2001, the Block Parties terminated the standstill agreement. Plaintiffs completed waiver of service in February of 2001 in this litigation after this court issued a dismissal order to which Plaintiffs responded with, and the court granted, a motion to retain. In March of 2001, the Missouri state court granted HRB Royalty's motion for summary judgment in which Defendant HRB

Royalty sought a declaration of its right to non-renew the franchise agreements[1]. The Block Parties filed the motion to dismiss this litigation on April 25, 2001. On June 11, 2001, the court heard oral arguments on Defendants' motion to dismiss.

II. Analysis

There is an "unflagging obligation of the federal courts to exercise the jurisdiction given [it]." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). However, this unflagging obligation is tempered by the court's discretion to abstain which rests on "considerations of 'wise judicial administration giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" *Id.* at 817 (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952)). The discretion to exercise what is termed *Colorado River* abstention is to be applied only when the court is presented with 'exceptional circumstances.' *Id.* at 818. The *Colorado River* abstention doctrine is more circumscribed than other federal court abstention doctrines: "Because the policy underlying *Colorado River* abstention is judicial efficiency, this doctrine is substantially narrower than are the doctrines of *Pullman*, *Younger* and *Burford* abstention, which are based on 'weightier' constitutional concerns." *Federated Rural Elec. Ins. Corp. v. Arkansas Elec. Coop.*, 48 F.3d 294, 298 n.4 (8th Cir. 1995).

[1] That decision is now before the Missouri Court of Appeals.

Defining exceptional circumstances and informing the decision to abstain are six factors enumerated by the Supreme Court in *Colorado River* and *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983).

> The *Colorado River-Moses H. Cone* factors are as follows: (1) whether there is a res over which one court has established jurisdiction, (2) the inconvenience of the federal forum, (3) whether maintaining separate actions may result in piecemeal litigation, unless the relevant law would require piecemeal litigation and the federal court issue is easily severed, (4) which case has priority–not necessarily which case was filed first but a greater emphasis on the relative progress made in the cases, (5) whether state or federal law controls, especially favoring the exercise of jurisdiction where federal law controls, and (6) the adequacy of the state forum to protect the federal plaintiff's rights.

United States Fid. & Guar. Co. v. Murphy Oil USA, Inc., 21 F.3d 259, 263 (8th Cir. 1994). This does not serve as a "mechanical checklist," as not all of the enumerated factors will necessarily be relevant to the issue before the court. *Moses H. Cone*, 460 U.S. at 16. The court must balance the relevant factors "in a pragmatic, flexible manner with a view to the realities of the case at hand" to determine whether to exercise its discretion to abstain. *Id.* at 21; *see also Liberty Mut. Ins. Co. v. Foremost-McKesson, Inc.*, 751 F.2d 475, 477 (1st Cir. 1985).

The first factor, whether there is a res over which one court has established jurisdiction, is not relevant to the court's determination of whether exceptional circumstances exist. *Federated Rural Elec. Ins. Corp.*, 48 F.3d at 297. This is an in personam jurisdiction case, therefore the res factor does not figure into the court's

calculation. *Id.* at 297. The second factor–the inconvenience of the federal forum–does not tilt the court toward abstaining. *See Globe Indem. Co. v. Wrenn Ins. Agency of Missouri*, 816 F. Supp. 1382, 1383 (W.D. Mo. 1992). "The question here is not merely which forum is the more convenient, rather it is whether the federal forum is so inconvenient as to militate in favor of abstention." *Id.* The Plaintiffs have selected Missouri and Iowa as forums to litigate a dispute with the Defendants. Defendants are corporations with significant business operations around the country, including Iowa and Missouri. Therefore, it is apparent that a federal forum, for either party, is a convenient forum to litigate. Thus, this factor does not militate in favor of abstention. *Id.*

The third factor, the threat of piecemeal litigation resulting from maintaining separate actions, is of concern to this court. In this litigation, the potential for piecemeal litigation is perhaps the most significant factor informing the decision to abstain. This factor considers the court's concern for the conservation of judicial resources without sacrificing the comprehensive disposition of the case. *Federated Rural Elec. Ins. Corp.*, 48 F.3d at 298. Eighth Circuit case law "ha[s] advanced this policy by favoring the most complete action." *Id.* (citing *United States Fid. & Guar. Co.*, 21 F.3d at 263; *Employers Ins. of Wausau v. Missouri Elec. Works*, 23 F.3d 1372, 1375 (8th Cir. 1994)). The potential for piecemeal litigation in this case is

significant. Plaintiffs in this litigation are also among the some twenty-four Plaintiffs in the Missouri state court litigation. Plaintiffs contend the right to arbitrate did not ripen until the Defendant chose to execute the Nonrenewal Notices, and therefore, the right to arbitrate is not a part of the Missouri litigation. Plaintiffs allege the Defendants' issued the Nonrenewal Notices as retaliation against the Plaintiffs for filing suit in Missouri state court because the only franchisees that received the Nonrenewal Notices were the franchisees that are Plaintiffs in the Missouri state court litigation. The Nonrenewal Notices were sent in June of 2000 and were the subject of Defendant HRB's motion for summary judgment. The Missouri court determined, as a matter of law, Defendant HRB Royalty had a right to non-renew the franchise agreements. Plaintiffs did not seek a demand for arbitration when the Nonrenewal Notices were sent out or in the summary judgment stage of the state court litigation. The court will not speculate as to Plaintiffs' litigation strategy or to the Defendants' response to it, nor will it figure either in the court's calculation to abstain from this litigation. However, for purposes of determining whether exceptional circumstances exist, the court believes the potential for piecemeal litigation and the problems that accompany it weigh in favor of abstention[2]. It appears to this court that the Missouri

[2] The court notes that another federal court has abstained from this case in deference to the Missouri state court litigation because of the threat or potentiality of piecemeal litigation. *See JBW Ltd. P'ship v. HRB Royalty, Inc.*, Telephone Conference with the Honorable William R. Wilson, Jr., (E.D. Ark. Aug. 23, 2000)

state court is the more effective forum to raise the arbitration claim and provides the best opportunity for a comprehensive disposition of this litigation. *See Liberty Mut. Ins. Co.*, 751 F.2d at 477.

The fourth factor in the exceptional circumstances calculation relates to the progress the cases have made in the particular court where each was filed. *BASF Corp. v. Symington*, 50 F.3d 555, 559 (8th Cir. 1995). The touchstone for measuring this "priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." *Moses H. Cone*, 460 U.S. at 21. This factor "stems from the familiar first-to-file rule, but has in the context of parallel state-federal litigation developed to require an assessment not just of which case was filed first, but which has made more progress." *BASF Corp.*, 50 F.3d at 559.

Before proceeding with analyzing this factor, the court must first ascertain whether the federal litigation is indeed parallel with the Missouri state court litigation. In determining whether litigation is parallel, the court's focus is on "whether there is a danger of inconsistent results and a duplication of judicial proceedings." *Terra Int'l,*

(Defendants' Exhibit 7) ("Despite the strong policy against abstention, I am going to abstain. I think the potential for piecemeal litigation is rather substantial, and I think the state forum which was originally selected by the plaintiffs is adequate to protect the plaintiffs' rights.").

Inc. v. Mississippi Chem. Corp., 896 F. Supp. 1468, 1476 (N.D. Iowa 1995). "Suits are deemed to be 'parallel' when substantially the same parties are contemporaneously litigating substantially the same issues in separate forums." *Globe Indem. Co.*, 816 F. Supp. at 1382. "In determining whether to dismiss or stay an action in favor of parallel litigation in state courts or other federal courts, a federal court should consider "wise judicial administration, . . . conservation of judicial resources, and comprehensive disposition of litigation." *EFCO Corp. v. Aluma Systems, USA, Inc.*, 983 F. Supp. 816, 824 (S.D. Iowa 1997) (quoting *Colorado River*, 424 U.S. at 817); *see also Ins. Co. of the State of Pennsylvania v. Syntex Corp.*, 964 F.2d 829, 834 (8th Cir. 1992) ("[The state court] was the first to obtain jurisdiction and that court is better able to protect the rights of the parties because all of [defendants'] insurance carriers are parties to that litigation.").

This case presents the court with parallel litigation. While some of the Plaintiffs in the Missouri action are not a party to this action, all the Defendants in this case are also all the Defendants in the Missouri state court. The court has substantially the same parties before it as are participating in the Missouri litigation. The issues in the Missouri state court litigation and the federal court litigation stem from essentially the same core operative facts. The potential for overlap between the issues being litigated in separate forums lead this court to conclude the litigation in the Missouri

state court is indeed parallel with this litigation. "[S]imultaneous adjudications regarding identical facts and highly similar legal issues creates the risk of inconsistent judgment." *EFCO Corp.*, 983 F. Supp. at 824. Exercising this court's discretion to abstain from this case will not deprive Plaintiffs of a forum to litigate the claims raised as Plaintiffs have engaged the Nonrenewal Notices in the Missouri state court litigation.

Having determined the court is faced with parallel litigation, the court will turn to the progress each case has made in its respective court. *Federated Rural Elec. Ins. Corp.*, 48 F.3d at 298-99. The Missouri litigation was filed in April of 1999, and this case was filed in August of 2000. In the Missouri litigation, the Defendants moved for, and were granted, summary judgment on count I of the counterclaim filed by Defendants. The grant of summary judgment held the Agreements were contracts of an indefinite term and needed the consent of both parties for renewal. HRB Royalty did not consent to renewal. Granting Plaintiffs' demand for arbitration in this case may duplicate the issues litigated in the Missouri court. Plaintiffs' case in the Missouri state court is more advanced than the litigation in this court. The court will not expend judicial resources merely because the particular procedural and substantive dispositions of the Missouri state court litigation have been adverse to the Plaintiffs. The Missouri state court litigation is clearly at a more advanced stage, is

the more comprehensive litigation, and involves substantially the same issues and parties as does the instant case:

> When a district court decides to dismiss or stay under *Colorado River*, it presumably concludes that the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties. If there is any substantial doubt as to this, it would be a serious abuse of discretion to grant the stay or dismissal at all.

Moses H. Cone, 460 U.S. at 28.

The fifth factor contemplates whether state or federal law controls the issue being litigated. *GEICO v. Simon*, 917 F.2d 1144, 1149 (8th Cir. 1990). Here, it is unquestionably an issue of state law construction. Federal law is not implicated in the Missouri litigation or the litigation in this court. If this litigation involved some controlling federal law, the court would likely not abstain. *Id.*; *see also United States Fid. & Guar. Co.*, 21 F.3d at 263. Plaintiffs' amended complaint states the Defendants violated the Iowa Franchise Practices Act, Iowa Code Annotated §§ 523H.1 et seq. (2000). Plaintiffs also pled the Iowa Franchise Practices Act in opposition to Defendant HRB Royalty, Inc.'s motion for summary judgment in the Missouri litigation.

> As the *Moses Cone* case instructs, *Colorado River* abstention, which allows federal courts to dismiss or stay cases in deference to concurrent state court proceedings, is appropriate where the federal court faces the identical substantive issue presented in the state court. In such a case, 'a stay of the federal suit pending resolution of the state suit mean[s] that there would be no further litigation in the federal forum;

the state court's judgment on the issue would be res judicata.'

Boushel v. Toro Co., 985 F.2d 406, 409 (8th Cir. 1993) (quoting *Moses H. Cone*, 460 U.S. at 10). Plaintiffs' also demand arbitration for the non-renewal of the Agreements. The court believes the arbitration issue is more intimately tied to the Missouri litigation and the rulings of the Missouri state court, and as such, any foray into that issue and surrounding claims would be res judicata. However, because the court is exercising its discretion to abstain and dismissing this case, the court does not need to get into the issue of whether the Plaintiffs have waived the right to arbitration. *See Ritzel Communications v. Mid-American Cellular*, 989 F.2d 966, 969 (8th Cir. 1993) ("[W]e will find waiver where the party claiming the right to arbitrate: (1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts.").

The sixth factor seeks to ensure the state forum is an adequate forum to protect the federal plaintiff's rights if the court exercises its discretion to abstain. *United States Fid. & Guar. Co.*, 21 F.3d at 263. If the state forum proves to be inadequate, the federal court should not abstain from the action. *Id.* If the Nonrenewal Notices were sent as retaliation for filing suit in Missouri, the Missouri court is better suited to determine the veracity of the complaint and to protect the rights of the franchisees. The Nonrenewal Notices are a significant component of the

substantive litigation in the Missouri state court. The right to arbitration, if it exists for these Plaintiffs, arises, in part, from the ruling of the Missouri court. The federal Plaintiffs here, also the state court Plaintiffs in Missouri state court, seek from this court a remedy to the ruling of the Missouri court. The Missouri court is an adequate, and, in this court's view, proper forum to protect the Plaintiffs' rights. *See Ins. Co. of the State of Pennsylvania*, 964 F.2d at 835.

III. Conclusion

The court believes this case presents the rare exceptional circumstances necessary to warrant the court's abstention from this case and granting of the Defendants' motion to dismiss. There is a significant risk of piecemeal litigation if Plaintiffs pursue this claim in the federal and state courts. The Missouri state court litigation has progressed substantially more than the federal court litigation, and the state court litigation is more comprehensive than the federal court litigation. The issues turn on questions of state law, not federal law. Finally, the Missouri state court is an adequate forum to protect the Plaintiffs' interests and rights. It is this court's view that the Missouri state court litigation is "an adequate vehicle for the complete and prompt resolution of the issues between the parties." *Moses H. Cone*, 460 U.S. at 28. Accordingly, the Defendants' motion to dismiss is granted.

ORDER

For the reasons mentioned herein, the Defendants' motion to dismiss is GRANTED.

Done and so ordered this ____ day of November, 2001.

_____
Michael J. Melloy,
United States District Judge for the
Northern District of Iowa